(2)

No. 94-1112

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In The

Supreme Court of the United States

October Term, 1994

ROBERT WORKMAN,

Petitioner,

vs.

SHERIFF ED JORDAN, in his individual capacity, and UNDERSHERIFF RICK DILL, in his individual capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a government employee's testimony regarding matters of purely personal interest at a quasi-judicial, administrative hearing is inherently a matter of public concern subject to First Amendment protection?

2. Whether a First Amendment claim is timely filed under a two year statute of limitations where the allegations of the complaint, filed in November of 1990, show that the employee was injured in July of 1987 when he was placed on disciplinary suspension and given an adverse performance review in alleged retaliation for his testimony at a co-employee's grievance hearing, which adverse performance review then caused the employee additional injury when it was used in substantial part in November of 1989 as the basis for his termination?

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STATEMENT OF FACTS[1]

A. Factual Background

Respondent Ed Jordon is the duly elected sheriff of Weld County, Colorado. Respondent Rick Dill is the appointed undersheriff in the Weld County Sheriff's Office. Petitioner Robert Workman is a captain in the Weld County Sheriff's Office. At all times relevant to this lawsuit, all three people occupied the positions stated (Aplt. App. at Tab 1, pp.1-2, ¶¶ 2-4). This lawsuit concerns the conduct of Captain Workman toward female employees in the Weld County Sheriff's Office, and the efforts of Sheriff Jordan and Undersheriff Dill to deal with such conduct.

In the spring of 1989, two female employees in the sheriff's office complained to Sheriff Jordan about "rude treatment" and "inappropriate comments" by Workman (*Id.* at 89). In June of 1989, two female employees of the sheriff's office met with Sheriff Jordan and Undersheriff Dill to complain about Workman's abrupt and rude demeanor (*Id.* at 8, ¶ 33). One of these employees, Marilyn Bedford, complained that Workman had been rude to her, that he had made a sexist remark to her and that he had called her a bitch (*Id.* at 8-9, ¶¶ 30, 33). The other employee, Susan Jarrett, complained of receiving a "wolf whistle" as she passed Workman's office, that Workman had called her "red riding hood" when she wore a red dress, that

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1. The following statement of facts is taken from the allegations of Workman's complaint and the attached documents (Aplt. App. at Tab 1). In keeping with the appropriate standard of review, all of the factual allegations of the complaint are accepted as true, except where specifically contradicted by the documents attached to the complaint. Where Workman has attached a document and summarized its contents, but the summary is contradicted by the document, the facts as contained in the referenced document are adopted. This statement of facts is also presented with the admonition of Rule 15.1 of the Rules of the Supreme Court in mind. References are to the Appellant's Appendix which was filed in the underlying appeal in the Tenth Circuit.

Workman had made a comment about her fiance, and that Workman had said her services were not needed by the sheriff (*Id.* at 8-9, ¶¶ 31, 33). On October 18, 1989, Susan Jarrett complained to a supervisory employee in the sheriff's office that on October 13, 1989 Workman had stood too close to her and pinched her cheek (*Id.* at 5, ¶ 23). Sheriff Jordan and Undersheriff Dill received "specific, actual and contemporaneous knowledge of these complaints." (*Id.* at 8, ¶ 36).

On October 19, 1989, Undersheriff Dill issued to Workman a memorandum regarding "Notice of Internal Investigation" stating that allegations had been made against Workman by a female employee at the Weld County Sheriff's Office which "if substantiated, may constitute sexual harassment," placing Workman on administrative leave and notifying Workman that the personnel department would be initiating an investigation of the allegations (*Id.* at 5, ¶ 24 and p. 42). The investigation was conducted by an officer from the police department of the City of Greeley, Colorado (*Id.* at 5-6, ¶ 26). At the conclusion of his investigation, the investigator made the following factual findings:

1. Workman had made "wolf whistles" to a female employee which intimidated her into changing her dress.

2. Workman violated the personal space of female employees. In one case he had stood only a few inches from Susan Jarrett.

3. Workman pinched Susan Jarrett on the cheek.

4. Workman made a sexist remark to Susan Jarrett about how women should work in jobs involving typewriters.

5. Women reported "unwelcomed touches" by Workman.

6. Some women in the sheriff's office perceived that Workman believes women are lower than men.

7. Workman made a comment to Marilyn Bedford that "maybe we better give this job to a man to get it done right."

8. Workman created a level of fear among female employees.

9. Workman's behavior caused emotional stress among the female employees, evidenced by the crying of a few female employees.

10. Workman used inappropriate language of a sexual nature.

11. Workman called women "bimbo," "sweetie," "bitch."

(*Id.* at 43-44). Based upon a review of the factual information compiled by the investigator, David Worden, Acting Director of Personnel for Weld County, concluded that Workman was guilty of sexual harassment:

> It is my finding that Capt. Workman's behavior had the effect of creating a sexually intimidating, hostile, and offensive working environment. This is evidenced throughout the interviews of women in the department.

* * *

> It is my feeling that there was some sexual harassment. He has created a hostile working environment towards certain female employees, in particular, Susan Jarrett, Marilyn Bedford and Linda Hartley. He has at times used comments and behaviors of a sexual nature to help create this environment.

(*Id.* at 43-44).

On November 8, 1989, Workman attended a "predetermination hearing" with Sheriff Jordan and Undersheriff Dill, to discuss the results of the investigation (*Id.* at 10, ¶ 43). Because the investigation sustained the charge of sexual harassment, Undersheriff Dill recommended to Sheriff Jordan that Workman be terminated. (*Id.*) Following the "predetermination hearing," Workman was given a copy of the results of the investigation (*Id.* at 8-9,1 ¶ 38), and Sheriff Jordan terminated Workman's employment (*Id.* at 10, ¶ 43). On November 11, 1989, Sheriff Jordan gave Workman a written notice of termination which states in part:

> The findings from the Personnel Department were sustained in the matter of Sexual Harassment, stating that your "behavior had the effect of creating a sexually intimidating, hostile, and offensive working environment." This is evidenced through the interview of women in the department. Again, I refer you to page 13 of the Weld County Personnel Policy Handbook, paragraph SEXUAL HARASSMENT, wherein this conduct is again cause for "strong disciplinary action up to and including termination."

(Aplt. App. at Tab 1, pp. 45-46).

Workman appealed his termination pursuant to established grievance procedures (*Id.* at 15-18). The hearing on Workman's appeal was conducted by a neutral hearing officer; Workman was represented by an attorney; and Workman was given extensive due process rights (*See id.* at 15-18, particularly pp. 15-16, ¶ 55). The post-deprivation grievance hearing commenced on March 6, 1990, and continued over several days (*Id.* at 48). Numerous witnesses testified and nearly thirty exhibits were introduced, including transcripts of interviews with department employees. (*Id.*) At the conclusion of the proceeding, the hearing officer issued a seven-page opinion containing findings of fact, conclusions of law and his decision sustaining Workman's grievance, reversing his termination and ordering reinstatement (*Id.* at 48-54). Although the hearing officer specifically found that "some of Captain Workman's comments were vulgar, sexist, inconsiderate and inappropriate in the work place," he nonetheless concluded that Workman's conduct "did not rise to the level of sexual harassment" and therefore that his termination should be reversed (*Id.* at 48-54). On April 11, 1990, Workman was reinstated to his position at the Weld County Sheriff's Office "with all back pay." (*Id.* at 1-2, ¶ 2).

Following Workman's reinstatement, Undersheriff Dill placed in Workman's personnel file a letter of reprimand and performance appraisal and subjected Workman to a "re-entry plan." (*Id.* at 23-24, ¶¶ 66.a-d). The letter of reprimand and performance appraisal essentially inform Workman that his conduct toward women, although not found by the hearing officer to rise to the level of sexual harassment, would no longer be tolerated (*Id.* at 67-76). The reprimand letter explains what standard of conduct would be required (*Id.* at 67-68); the performance appraisal identifies specific areas of conduct needing improvement and recommends that Workman attend various training classes and seminars to effectuate that improvement (*Id.* at 72-76); and the re-entry plan imposes a

number of responsibilities, duties and tasks on Workman, for which his performance could again be evaluated (*Id.* at 24, ¶ 66.d).

On January 27, 1992, the Federal Bureau of Investigation ("FBI") reviewed Workman's personnel file as part of a background check in connection with Workman's application to the FBI Academy at Quantico, Virginia (Aplt. App. at Tab 9 and Tab 10, pp. 31-32, ¶¶ 83.f-83.h). The FBI was able to review Workman's letter of termination, the hearing officer's findings, the order reinstating Workman to his position as captain, the letter of reprimand and the performance evaluation. (*Id.* at ¶ 83.g). Following its review of this material, the FBI denied Workman admission to the Academy (*Id.* at ¶ 83.h).

B. Federal Proceedings

On November 13, 1990, Workman sued Weld County, Sheriff Ed Jordan, Undersheriff Dill and other defendants in the United States District Court for the District of Colorado, alleging various theories of relief under 42 U.S.C. § 1983 and state law (Aplt. App. at Tab 1). As relevant here, Workman alleged that Sheriff Jordan and Undersheriff Dill in both their individual and official capacities violated Workman's rights under 42 U.S.C. § 1983 to procedural due process, liberty interests and freedom of speech (Aplt. App. at Tab 1, pp. 26-32).

Sheriff Jordan and Undersheriff Dill moved to dismiss the federal claims against them in their individual capacities on the basis of qualified immunity (Aplt. App. at Tab 2, pp. 14-16, and Tab 5). The district court denied this motion (Aplt. App. at Tab 13). Nonetheless, the district court dismissed on the merits the third claim for relief alleging a violation of Workman's right to free speech (*Id.* at 5).

Respondents Jordan and Dill, in their individual capacities,

appealed the denial of their motions to dismiss based upon qualified immunity. Petitioner Workman cross-appealed the dismissal of his third claim for relief. The United States Court of Appeals for the Tenth Circuit reversed the district court's ruling on qualified immunity but affirmed the dismissal of the First Amendment claim. *Workman v. Jordan,* 32 F.3d 475 (10th Cir. 1994). The Tenth Circuit found the First Amendment claim barred in part by the appropriate statute of limitations and in part by the personal nature of Workman's speech. *Id.* The Tenth Circuit subsequently denied Workman's petition for rehearing and suggestion of rehearing *en banc* with respect to his First Amendment claim.

REASONS FOR DENYING THE WRIT

Summary of Argument

The decision below does not create a conflict with decisions of the Fifth Circuit over what constitutes speech on a matter of public concern. The Fifth Circuit has held that testimony by one employee at a co-employee's equal employment opportunity hearing is inherently a matter of public concern. *Johnston v. Harris County Flood Control District,* 869 F.2d 1565,1576-1579 (5th Cir. 1989), *cert. denied,* 493 U.S. 1019 (1990). The Tenth Circuit did not reject that holding, but merely declined to extend it to testimony by one employee at his own personnel grievance hearing. *Workman v. Jordon,* 32 F.3d 475, 483 (10th Cir. 1994). Thus, this case does not present the Court with an appropriate opportunity to review the Fifth Circuit's test for protected speech.

The First Amendment protects employee speech on matters of public concern because such speech occupies the "highest rung [in] the hierarchy of First Amendment values," and is essential to our system of self-government. *Connick v. Myers,* 461 U.S. 138, 145 (1983). Conversely, when the employee's speech does not address matters of public concern, the government employer is

allowed "wide latitude" in managing its personnel, because such speech does not contribute to the marketplace of ideas. *Connick, supra,* 461 U.S. at 146. The context alone of the employee's speech cannot automatically elevate it to a matter of public concern any more than the cover of a book can transform the nature of its contents. Quite simply, petitioner's argument elevates form (testimonial speech) over substance (the public concern requirement), and has been properly rejected by nearly every circuit to consider it.

There is a third reason for refusing to issue the writ with respect to petitioner's free speech claim, to the extent that claim is based upon actions allegedly taken in retaliation for his testimony at his own grievance hearing in March of 1990. The alleged acts of retaliation for this speech upon which petitioner focuses consist of the placing of true documents (a letter of reprimand and a performance appraisal) in his personnel file, and subjecting petitioner to a "re-entry plan" (essentially, a list of duties). Although petitioner argues that the contents of these documents are false, the record demonstrates to the contrary, as specifically found by the Tenth Circuit. *Workman, supra,* 32 F.3d at 481. In retaliation for his speech in 1990, petitioner was not fired, demoted, denied promotion or denied any other substantial benefit. To the contrary, following his 1990 testimony, petitioner was restored to his former position as a captain in the Weld County Sheriff's Office and given an award of all back pay (Aplt. App. at Tab 10, p. 2, ¶ 2). The acts of retaliation allegedly taken in response to petitioner's 1990 speech are simply too insubstantial to merit constitutional scrutiny.

The Tenth Circuit also properly found petitioner's free speech claim, to the extent based upon allegations of actions taken in retaliation for his testimony at a co-employee's grievance hearing in July of 1987, to be time-barred under the applicable two year statute of limitations. *Workman, supra,* 32 F.3d at 482. Accepting the allegations of his complaint, petitioner

knew in July of 1987 that respondents had retaliated against him for testifying at his co-worker's grievance by placing him on disciplinary suspension, subjecting him to an unscheduled performance appraisal and giving him his first unsatisfactory performance review in his lengthy employment history. The allegation that respondents subsequently relied in part upon this unsatisfactory performance appraisal as grounds for dismissing petitioner in November of 1989 merely shows the development of additional injury from the initial act of retaliation. Because petitioner could have maintained an action for damages under 42 U.S.C. § 1983 in July of 1987 for the injury allegedly caused by his disciplinary suspension and unsatisfactory performance review, the Tenth Circuit properly found petitioner's November 1990 claim for retaliation against his July 1987 testimony to be time-barred.

I. THE TENTH CIRCUIT'S HOLDING DOES NOT CREATE A CONFLICT WITH THE LAW OF THE FIFTH CIRCUIT.

Focusing on a perceived disagreement between the decision below and the decision of the United States Court of Appeals for the Fifth Circuit in *Johnston, supra,* Workman urges this Court to issue a writ of certiorari to the Tenth Circuit in order to resolve the issue of whether a government employee's testimonial speech at his grievance hearing, no matter how personal or trivial, is inherently a matter of public concern. This Court should decline the invitation for numerous reasons, as explained herein. First among them, however, is the absence of any substantial disagreement between the Fifth and Tenth Circuits.

In *Johnston, supra,* the Fifth Circuit held that sworn, testimonial speech by a government employee at a co-employee's equal employment opportunity hearing is inherently a matter of public concern. 869 F.2d at 1578. In contrast to the situation in *Johnston*, the case at hand does not involve testimony by one

employee at another employee's equal employment opportunity hearing, but testimony by one employee at his own personnel grievance hearing.[2] After discussing *Johnston*, the Tenth Circuit noted that Workman "has not cited any cases holding that sworn testimony in an employee's grievance proceeding is necessarily of a public concern." *Workman, supra*, 32 F.3d at 483. The Tenth Circuit has acknowledged that one employee may have an interest in testifying on behalf of another employee where the co-employee's livelihood and/or reputation are at stake. *See Melton v. City of Oklahoma City*, 879 F.2d 706, 715 (10th Cir. 1989), *cert. denied*, __ U.S. __, 112 S. Ct. 297 (1991). However, the Tenth Circuit simply refused to accept that Workman's self-serving testimony at his own personnel grievance hearing was inherently a matter of public concern. 32 F.3d 483. Thus, rather than rejecting the Fifth Circuit's analysis in *Johnston*, the Tenth Circuit left open the possibility that it would follow *Johnston* when confronted with the appropriate facts. This case therefore does not present the Court with an appropriate opportunity for reviewing the correctness of the Fifth Circuit's test for protected speech.

II. THE DEVIATION BY THE FIFTH CIRCUIT FROM THIS COURT'S "PUBLIC CONCERN" REQUIREMENT DOES NOT JUSTIFY ISSUING THE WRIT OF CERTIORARI TO THE TENTH CIRCUIT.

The public interest in free and unhindered debate on matters of public interest is the core value of the Free Speech Clause of the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968). The First Amendment therefore embraces the liberty "to discuss publicly and truthfully all matters of public

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2. Although Workman's complaint sets forth the factual basis for two discreet claims of retaliation (Aplt. App. at Tab 10, p. 33, ¶¶ 85-90), the Tenth Circuit properly held that the first claim (which involved testimony by Workman at a co-employee's grievance hearing) was time-barred. *Workman, supra*, 32 F.3d at 482.

concern without previous restraint or fear of subsequent punishment." *Thornhill v. State of Alabama*, 310 U.S. 88, 101 (1940). Conversely, there are categories of speech to which the "majestic protection" of the First Amendment does not extend because they are "no essential part" of the marketplace of ideas. *Bose Corp. v. Consumers Union of the United States Inc.*, 466 U.S. 485, 504 (1984). Among these are statements made by public employees in their employment capacity which do not touch on matters of public concern. *Bose Corp., supra,* 466 U.S. at 505, n.22.

The function of the courts when confronted with the question of public employee speech is to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra,* 391 U.S. at 568; *see also, Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 284 (1977) (same); *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 414 (1979) (same); *Connick v. Myers*, 461 U.S. 138, 142 (1983) (same); *Rankin v. McPherson,* 483 U.S. 378, 384 (1987) (same). The "threshold question" for the court's determination is whether the employee's speech addresses a matter of public concern. *Rankin, supra*, 483 U.S. at 384. If it does not, "it is unnecessary for [the court] to scrutinize the reasons" for the employment decision. *Connick, supra,* 461 U.S. at 146; *see also, Waters v. Churchill,* __ U.S. __, 114 S. Ct. 1878, 1887 (1994) ("... we have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern").

Petitioner seeks to eliminate this Court's "threshold question" for the determination of whether a public employee's speech is constitutionally protected. Relying primarily upon the Fifth Circuit's decision in *Johnston, supra*, petitioner would have this Court issue the writ of certiorari to the Tenth Circuit in order

to establish that testimonial speech at any employee grievance hearing is inherently a matter of public concern, no matter how trivial or personal the content of the speech. The Court should decline the invitation.

This Court has repeatedly refused to consider the form or content of the speech alone as determinative of its constitutional status. *Givhan, supra*, 439 U.S. at 415-416 (speech on matters of public concern does not lose protected status because it is delivered in private); *Connick, supra,* 461 U.S. at 148, n.8 (discussing *Givhan, supra*); *Rankin, supra,* 483 U.S. at 386, n.11 (discussing *Givhan*). Rather, in determining whether an employee's speech addresses a matter of public concern, the Court is to consider the "content, form *and* context of a given statement, as revealed by the *whole record.*" *Connick, supra,* 461 U.S. at 147-148 (emphasis added). As this Court explained quite clearly in *Connick*, the limitation of constitutional protection to speech on matters of public concern was not accidental:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern" was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.
>
> * * *
>
> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should

> enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
>
> * * *
>
> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 143, 146-147. Without this "common-sense" restriction to matters of public concern, the federal courts would be "swamped with routine employee grievances mischaracterized as First Amendment cases." *Connick, supra,* 461 U.S. at 165 (Brennan, Marshall, Blackmun and Stevens, J.J., dissenting).

Every federal circuit recognizes that subject matter of "public concern" is the "threshold" requirement in determining the constitutional status of employee speech. *O'Connor v. Steeves*, 994 F.2d 905, 912-913 (1st Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 634 (1993); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1058 (2nd Cir. 1993), *cert. denied*, __U.S. __, 114 S. Ct. 185 (1993); *Czurlanis v. Albanese*, 721 F.2d 98, 103 (3rd Cir. 1983); *Arvinger v. Mayor and City Council of Baltimore*, 862 F.2d 75, 77 (4th Cir. 1988); *Brawner v. City of Richardson*, 855 F.2d 187,191 (5th Cir. 1988); *Rice v. Ohio Dept. of Transportation*, 887 F.2d 716, 720 (6th Cir. 1989), *vacated on other grounds*, 497 U.S. 1001 (1990); *Gray v. Lacke*, 885 F.2d 399, 410 (7th Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990);

Smith v. Cleburne County Hospital, 870 F.2d 1375, 1381 (8th Cir. 1989), *cert. denied*, 493 U.S. 847 (1989); *McKinley v. City of Eloy*, 705 F.2d 1110,1113-1114 (9th Cir. 1983); *Koch v. City of Hutchinson*, 847 F.2d 1436,1440 (10th Cir. 1988), *cert. denied*, 488 U.S. 909 (1988); *Stough v. Gallagher*, 967 F.2d 1523,1527 (11th Cir. 1992). The circuits also generally recognize that if the employee's speech does not touch on a subject of public concern, the constitutional inquiry is at an end. *Czurlanis, supra*, 721 F.2d at 103; *Arvinger, supra*, 862 F.2d at 77; *Rice, supra*, 887 F.2d at 720; *Ferrara v. Mills*, 781 F.2d 1508, 1512 (11th Cir. 1986). The circuits also recognize the reason for the restriction of constitutional protection to matters of public concern: a desire not to let government employees "constitutionalize" every employment decision. *See Arvinger, supra*, 862 F.2d at 78; *Rice, supra*, 887 F.2d at 720; *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 420 (7th Cir. 1988).

The decision of the Tenth Circuit below is directly in line with this Court's analysis as laid out from *Pickering* to *Rankin* and the majority of circuits applying this analysis. *Workman, supra*, 32 F.3d at 482-483. The Tenth Circuit properly noted that in order "To proceed with his First Amendment claim, Captain Workman must show the testimony he gave at his own grievance proceeding 'touches upon a matter of public concern'." 32 F.3d at 481. After considering the "content, form and context" of the speech at issue, "as revealed by the whole record," including Workman's motive for speaking, the Tenth Circuit properly concluded that Workman's speech "was clearly limited to his termination grievance and was not calculated to address concerns of the public." 32 F.3d at 482-483. Accordingly, the Tenth Circuit correctly found that Workman's speech did not rise to the level of constitutional protection. 32 F.3d at 483. Noting that "Captain Workman has not cited any cases holding that sworn testimony in an employee's own grievance proceeding is necessarily of a public concern," the Tenth Circuit rejected Workman's argument that the context alone of his speech elevated it to constitutional

status. *Id.* These conclusions by the Tenth Circuit followed naturally from an application of this Court's "public concern" requirement to Workman's speech.

In light of the widespread recognition and appreciation of the "public concern" requirement, this Court need not be overly alarmed by the Fifth Circuit's attempt in *Johnston* to widen the scope of protected speech. Disregarding the historical roots of the "public concern" requirement, the Fifth Circuit in *Johnston* held that "under certain circumstances . . . the *context* in which the employee speaks may be sufficient to elevate the speech to the level of public concern" and that "when an employee testifies before an official government adjudicatory or fact finding body he speaks in a *context* that is inherently of public concern." *Johnston, supra*, 869 F.2d at 1577-1578, emphasis added. Quite simply, the flaw in the Fifth Circuit's reasoning is that it elevates form (testimonial speech) over substance (content of public concern). If the employee is not speaking *on* a matter of public concern, the context *in which* he is speaking cannot transform his speech into a matter of public concern. The context in which the employee speaks may significantly affect the interest which the government as employer has in regulating that speech, but it should not affect the threshold determination of whether the subject matter upon which the employee speaks relates to an issue of public concern.

The majority of circuits to address this issue have expressly or implicitly rejected the Fifth Circuit's analysis. *Arvinger, supra*, 862 F.2d at 79; *Rice, supra*, 887 F.2d at 720-721; *Gray, supra*, 885 F.2d at 412-413 (involving the Petition Clause); *Ferrara, supra*, 781 F.2d at 1513-1514; *Yatvin, supra*, 840 F.2d at 419-420; *Curl v. Reavis*, 740 F.2d 1323, 1329, n.5 (4th Cir. 1984); *Martinez v. City of Opa-Locka*, 971 F.2d 708, 712 (11th Cir. 1992). As explained by the Eleventh Circuit Court of Appeals in *Ferrara, supra*:

> The *Pickering* balance is not triggered unless

> it is first determined that the employee's speech is constitutionally protected. If the employee's speech does not relate to matters of public concern, then the employee has no First Amendment interest against which the employer's interest need be weighed.
>
> * * *
>
> Ferrara deems it relevant that he followed established procedures in airing his grievance, thereby avoiding any disruption in the operation of the school. Again, this is a factor to be weighed in the *Pickering* balance to determine whether the employer has infringed upon the employee's constitutionally protected right to freedom of speech. (citation omitted) It bears no relation to the issue of whether the speech is constitutionally protected.

781 F.2d at 1513-1514.

If Workman's testimony at a grievance hearing is automatically a matter of public concern (no matter how limited or personal), then all speech in connection with all litigation must also necessarily be a matter of public concern. This position receives a sound rebuke from the Seventh Circuit Court of Appeals in *Yatvin, supra*:

> Not every legal gesture — not every legal pleading — is protected by the First Amendment.
>
> * * *
>
> Necessarily, by filing suit in an area of

> debated legal principles, Yatvin raised issues of public significance; but the marketplace of ideas would not have been constricted, the vitality of public debate diminished, or the range of ideas and opinions in our society curtailed, if fear of retaliation had caused her to refrain from filing charges of sex discrimination.
>
> * * *
>
> Everyone exaggerates the importance of his or her own activity, and it is therefore natural for lawyers to suppose that every legal pleading, however, humble, comes trailing clouds of First Amendment glory. But this is an extreme position and we reject it. The vitality of the marketplace of ideas does not depend on the volume of litigation in the federal courts.

840 F.2d at 419-420; *see also, Altman v. Hurst*, 734 F.2d 1240, 1244, n.10 (7th Cir. 1984) ("Thus, a private office dispute cannot be constitutionalized merely by filing a legal action"), *cert. denied*, 469 U.S. 982 (1984). Although petitioner posits that the First Amendment protects the right to testify truthfully at trial, petitioner perhaps has forgotten that when a witness is placed under oath he has a *duty* — not a privilege — to speak the truth. *Ullman v. United States*, 350 U.S. 422, 439, n.15 (1956); *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1100 (5th Cir. 1987).

Petitioner's request that this Court sanction all testimonial speech as inherently worthy of First Amendment protection is similar to efforts of other plaintiffs to seek special protection in the Petition Clause of the First Amendment. In an effort to evade this Court's public concern requirement, some plaintiffs have

argued that formal employee grievances are inherently a matter of public concern and therefore worthy of First Amendment protection under that amendment's guaranty of the right to petition for redress of grievances, because the speech is delivered in the form of a formal "grievance." The circuits which have addressed this issue — including the Fifth Circuit — have uniformly rejected this attempt to elevate form (grievance) over substance (the public concern requirement). *Renfroe v. Kirkpatrick*, 722 F.2d 714-715 (11th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984); *Belk v. Town of Minocqua*, 858 F.2d 1258, 1261-1262 (7th Cir. 1988); *Day v. South Park Independent School Dist.*, 768 F.2d 696, 701 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101(1986); *Gray, supra*, 885 F.2d at 412-413; *see also, Schalk v. Gallemore*, 718 F. Supp. 862, 867-868 (D. Kan. 1989); *Santella v. Grishaber*, 654 F. Supp. 428, 435-436 (N.D. Ill. 1987).

Petitioner attempts to legitimize *Johnston* by citing decisions from various other courts purportedly following the *Johnston* analysis. In most of those cases, however, the speech in fact addressed matters of public concern. *See Ziccarelli v. Leake*, 767 F. Supp. 1450, 1454 (N.D. Ill. 1991) (testimony at death penalty hearing; "A contentious political and social debate has long surrounded the ultimate penalty"); *Green v. City of Montgomery*, 792 F. Supp. 1238, 1253 (M.D. Ala. 1992) (court declines to address the *Johnston* issue because "all of the officers whom the plaintiffs allege were retaliated against by Folmar or Wilson for testifying or participating in litigation against these defendants were clearly addressing issues of public concern"); *Freeman v. McKellar*, 795 F. Supp. 733, 736 (E.D. Pa. 1992) (testimony concerning misuse of funds for personal ends by city councilmen); *Czurlanis, supra*, 721 F.2d at 104 ("Information concerning the functioning of a segment of the county government is of considerable public importance, . . ."). *Reeves*, a decision by the Fifth Circuit, also involved speech on a matter of public concern, *see* 828 F.2d at 1100, as petitioner admits. (*See* Petition for A Writ of Certiorari at 12, hereafter, "Petition").

Interestingly, the district court in the *Johnston* case held that Mr. Johnston's speech was protected both by reason of its context and its content. *See Johnston, supra*, 869 F.2d at 1576. The testimony involved in *Johnston* was given at an equal employment opportunity hearing, 869 F.2d at 1568, 1578, and it has been held that speech regarding discrimination in employment is inherently a matter of public concern. *Patrick v. Miller,* 953 F.2d 1240, 1247 (10th Cir. 1992). It is also worth noting that the Fifth Circuit in *Johnston* attempts to rationalize its holding by reliance on this Court's decision in *Rankin,* commenting that the speech at issue in *Rankin* did not involve a matter of public concern. *Johnston, supra,* 869 F.2d at 1577. *Rankin,* however, involved speech which expressed a desire to assassinate the President of the United States, speech which this Court noted clearly related to a matter of obvious public concern. *Rankin, supra,* 483 U.S. at 386-388.

Petitioner decries the public employee who is discharged for testifying truthfully under oath at an employment grievance hearing, even though his speech was of purely personal content. Noting the injustice of suffering acts of discrimination in retaliation for truthful testimony, petitioner argues for automatic First Amendment protection — no matter how trivial or of limited interest is the content of the testimony. Respondents agree that acts of retaliation of any kind for offering truthful testimony should not be tolerated. The remedy, however, lies in the rejuvenated use of state courts, not the incessant use of federal courts.

The State of Colorado provides many legal remedies for retaliatory discharge and other acts of retaliatory employment discrimination. *Martin Marietta Corp. v. Lorenz,* 823 P.2d 100, 104-110 (Colo. 1992); *Lathrop v. Entenmann's Inc.,* 770 P.2d 1367, 1372-1373 (Colo. App. 1989); Colorado Revised Statutes §§ 24-50.5-101, *et. seq.* (state "whistle-blower" statute). Petitioner is free to invoke these remedies, regardless of the

constitutional status of his speech. As the Seventh Circuit Court of Appeals explained in *Altman*:

> Despite our sympathy for plaintiff and our incredulity over some of the disciplinary measures imposed by defendants, we recognize that permitting him to maintain this action would open the federal flood gates to all manner of petty personnel disputes. Such disputes are best left to internal procedures established by employers and employees or, as here, where no such protection exists or where such procedures are inadequate, through state court adjudication.

734 F.2d at 1244; *see also, Curl, supra*, 740 F.2d at 1329, n.5 ("An employee's protection against being discharged in retaliation for filing E.E.O.C. charges, however, is not grounded in the Constitution but in Title VII. . . .").

Absent speech on a subject of public concern, a federal court is simply "not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick, supra*, 461 U.S. at 147. To set aside the limitation of speech on a matter of public concern would make of the First Amendment a "font of tort law," *see Paul v. Davis*, 424 U.S. 693, 701 (1976), which would flood the federal courts "with routine employee grievances mischaracterized as First Amendment cases." *Connick, supra*, 461 U.S. at 165. Accordingly, this Court should decline petitioner's invitation to issue the writ of certiorari to the Tenth Circuit to determine whether testimonial speech on matters of purely personal interest at an employee grievance hearing constitutes speech on a matter of public concern.

III. RESPONDENTS' CONDUCT IN ALLEGED RETALIATION FOR WORKMAN'S SPEECH AT HIS 1990 GRIEVANCE HEARING IS TOO INSUBSTANTIAL TO JUSTIFY CONSTITUTIONAL SCRUTINY IN FEDERAL COURT.

Petitioner alleges that respondents retaliated against him for testifying at his own grievance hearing in March of 1990. The alleged acts of retaliation for this speech consist of placing a performance evaluation and letter of reprimand in petitioner's personnel file and subjecting petitioner to a "re-entry plan." (Aplt. App. at Tab 10, pp. 23-24, ¶¶ 66.a-66.d). Following his 1990 grievance hearing, petitioner was reinstated to his former position in the Weld County Sheriff's Office and was awarded all back pay (Aplt. App. at Tab 10, p. 2, ¶ 2). He was not terminated, demoted or denied promotion. The alleged acts of retaliation for his 1990 grievance hearing testimony are too insubstantial to merit constitutional scrutiny.

It has long been settled that a state may not condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of speech. *Connick, supra*, 461 U.S. at 142. An employee's interest in speaking freely is constitutionally protected if the subject matter of his speech addresses an issue of public concern. *Connick, supra*, 461 U.S. at 143-146. The Constitution protects speech on issues of public concern because such speech occupies the "highest rung [in] the hierarchy of First Amendment values" and is essential to our system of self-government. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *see also, Connick, supra*, 461 U.S. at 145. In order to protect this essential predicate for self-government, the First Amendment forbids government employer decisions which could "chill" an employee's interest in speaking out on matters of public concern. *Connick, supra*, 461 U.S. at 145.

Not surprisingly, *Pickering* and its progeny address government decisions involving employee dismissals or employment contract "non-renewals" because "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering, supra*, 391 U.S. at 574; *Rankin, supra*, 483 U.S. at 384. *See Pickering, supra*, 391 U.S. at 564, 574 (teacher dismissed); *Mt. Health School Dist. Bd. of Educ., supra*, 429 U.S. at 276, 283 (teaching contract not renewed); *Givhan, supra*, 439 U.S. at 411-412 (teaching contract not renewed); *Connick, supra*, 461 U.S. at 140, 141 (district attorney discharged); *Rankin, supra*, 483 U.S. at 379, 382 (clerical employee discharged); *Waters, supra*, 114 S. Ct. at 1883 (nurse discharged). This Court has also noted that constitutional principles forbid the government from withholding any substantial benefit on grounds which inhibit the exercise of constitutionally protected rights. *Perry v. Sindermann*, 408 U.S. at 593, 597 (1972).

Workman, however, was neither terminated, demoted, denied promotion nor denied any other governmental benefit in alleged retaliation for his speech at his 1990 grievance hearing. Rather, following his successful use of the Weld County grievance procedures, he was restored to his former position as captain in the Weld County Sheriff's Office and given an award of all back pay (Aplt. App. at Tab 10, p. 2, ¶ 2). The alleged acts of retaliation for his 1990 testimony upon which Workman focuses consist only of the placement of the letter of reprimand and performance appraisal in his personnel file and the development of a "re-entry plan" for him. As noted, the Tenth Circuit properly found that nothing in either the letter of reprimand or the performance appraisal was false. *Workman, supra*, 32 F.3d at 481. The placing of documents containing true statements in an employee's personnel file and the development of a "re-entry plan" do not rise to the level of conduct sufficient to justify constitutional scrutiny in federal court.

Workman alleges that the letter of reprimand and performance appraisal contain "demonstrably false allegations" and "false and scandalous material." (Pet. at 6, 7). He complains that the letter of reprimand, performance appraisal and re-entry plan memorialized the allegations precipitating his termination, which allegations he asserts were specifically found to be false. (Pet. at 6, 7). As explained in the Statement of Facts, however, the factual allegations underlying the charge of sexual harassment were never found to be false. Rather, the hearing officer found that although the allegations were grounded in fact, they did not "rise to the level of sexual harassment by any definition available to the Hearing Officer" and were consistent with what he perceived to be the overall atmosphere in the sheriff's office (Aplt. App. at Tab 1, p. 50). For example, the hearing officer found that Workman's conduct was "inappropriate" and that he did use "sexist, vulgar, inconsiderate and inappropriate [language] in the workplace." (*Id.* at 50). Even Workman has never denied that the specific instances of improper conduct did in fact occur. To the contrary, he implicitly concedes that they did occur. (*See id.* at 10, ¶ 44).

Contrary to Workman's allegations, the letter of reprimand does not state that Workman is guilty of sexual harassment. (*See* Pet. at 6, 7). Rather, the reprimand reiterates the hearing officer's specific finding that some of Workman's comments were "vulgar, sexist, inconsiderate and inappropriate in the work place" and that Workman employed terms such as "bimbo" and "bitch." (Aplt. App. at Tab 1, p. 67). A comparison of the letter of reprimand with the hearing officer's findings demonstrates that the matters contained in both are entirely consistent: the reprimand reiterates the findings of the hearing officer, including the determination that Workman's actions did not constitute sexual harassment (*Compare* Aplt. App. at Tab 1, pp. 48-54 with pp. 67-70). The "performance appraisal" contains less that can be characterized as true or false and more that is a matter of opinion regarding Workman's professional qualifications and general

conduct (*Id.* at 72-76). Contrary to Workman's arguments, the performance appraisal does *not* accuse Workman of sexual harassment (*See, id.* at 72-76). The performance appraisal merely reiterates the hearing officer's findings of "inappropriate" behavior and notes that Workman is responsible "to improve the climate." (*Id.* at 75).

The placing of documents containing true statements in an employee's personnel file and the development of a "re-entry plan" do not constitute "potent means of inhibiting speech." *Pickering, supra*, 391 U.S. at 574. These actions stand at the opposite end of the spectrum of personnel decisions from the dismissals and non-renewals involved in *Pickering* and its progeny. To hold that these alleged acts of retaliation merit constitutional scrutiny would "trivialize" the First Amendment in a "Pyrrhic victory." *Connick, supra*, 461 U.S. at 154; *Parratt v. Taylor*, 451 U.S. 527, 545 (1981) (Stewart, J., concurring) ("To hold that this kind of loss is a deprivation of property within the meaning of the Fourteenth Amendment seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution"). To subject this type of conduct to constitutional scrutiny would be to extend an invitation for every "personnel decision taken by a public agency allegedly in reaction to the employee's behavior" to be reviewed in federal court. *Connick, supra*, 461 U.S. at 147. That would obviously run contrary to the "practical realities involved in the administration of a government office." *Connick, supra*, 461 U.S. at 154.

Accordingly, Workman's allegations of retaliation for testifying at his 1990 grievance hearing fail to show a constitutional violation, even if it is assumed that he spoke on matters of public concern. *See Siegert v. Gilley*, 500 U.S. 226, 114 L. Ed. 2d 277, 111 S. Ct. 1789, 1794 (1991) ("Siegert not only failed to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but he failed to establish the violation of any constitutional right at all").

Therefore, for this additional reason, the Court should decline Workman's request to issue a writ of certiorari to the Tenth Circuit to review that court's holding on Workman's First Amendment claim concerning various acts allegedly taken in retaliation for testimony at his 1990 grievance hearing.

IV. THE TENTH CIRCUIT PROPERLY FOUND WORKMAN'S FREE SPEECH CLAIM, TO THE EXTENT BASED UPON AN ALLEGED INCIDENT IN 1987, TO BE TIME-BARRED.

Although Workman's complaint sets out one claim for the alleged violation of his right to freedom of speech, this claim (as Workman explains in his petition) is based upon "two discreet, but very similar, violations" of his free speech rights (Aplt. App. at Tab 10, p. 33, ¶¶ 85-90; Pet. at 6). The first violation consists of an alleged act of retaliation for testimony Workman gave at a co-worker's grievance hearing in July of 1987, which retaliation allegedly injured Workman in July of 1987 and again in November of 1989. This will be referred to hereafter as the "first free speech claim." The second violation consists of alleged acts of retaliation for testimony Workman gave at his own grievance hearing in March of 1990. The Tenth Circuit properly found the first free speech claim to be time-barred. *Workman, supra*, 32 F.3d at 482.

When determining the appropriate statute of limitations to apply to a claim under 42 U.S.C. § 1983, such claims are best characterized as actions for personal injury. *Wilson v. Garcia*, 471 U.S. 261, 275-276 (1985). Federal courts therefore apply the state statute of limitations for personal injury actions when determining the timeliness of § 1983 claims. *Id.* In Colorado, that statute is Colo. Rev. Stats. § 13-80-102(1)(a) which provides a two year period of limitations for all tort actions. *Hunt v. Bennett*, 17 F.3d 1263, 1265-1266 (10th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 107 (1994). Workman does not dispute that the

Tenth Circuit applied the correct statute of limitations to his first free speech claim (Pet. at 8).

Although the federal courts must borrow the most appropriate state statute of limitations, the question of when a plaintiff's cause of action under § 1983 accrues for limitation purposes is governed by federal law. *Sandutch v. Muroski*, 684 F.2d 252, 254 (3rd Cir. 1982). A cause of action under § 1983 accrues when the plaintiff knows or has reason to know of the injury which forms the basis of his action. *Singleton v. City of New York*, 632 F.2d 185, 191 (2nd Cir. 1980), *cert. denied*, 450 U.S. 920 (1981). Workman implicitly concedes this principle (Pet. at 20).

Here, Workman knew of the injury (an allegedly negative performance review) which forms the basis of his first free speech claim when the review occurred in July of 1987. Because Workman did not sue for relief from that injury until he filed the complaint herein in November of 1990, the Tenth Circuit properly found this aspect of his free speech claim to be time-barred. *Workman, supra*, 32 F.3d at 482. Workman contends, however, that the Tenth Circuit misread his complaint. In particular, he contends that the first free speech claim set out in his complaint seeks damages for conduct taken in November of 1989 (his termination) which was based in substantial part upon the July 1987 negative performance appraisal. However, because Workman's termination in November of 1989 was allegedly based in substantial part upon the negative performance review of July 1987, and not upon Workman's speech at the July 1987 grievance hearing, Workman's complaint demonstrates that his termination in November of 1989 was merely a further manifestation of the injury he admits suffering in July of 1987.

According to Workman's complaint, in July of 1987 he testified adversely to the interests of Jordan and Dill at a co-employee's grievance hearing (Aplt. App. at Tab 10, p. 4, ¶ 17).

Within 24 hours of that hearing, Jordan and Dill imposed a "disciplinary suspension" upon Workman and ordered him to attend a previously unscheduled performance appraisal, at which Workman was given the first unsatisfactory performance review in his "lengthy employment history." (*Id.* at 4-5, ¶¶ 18-20; p. 33, ¶ 87) (*see also*, Pet. at 4, 22). More than two years later, in November of 1990, Jordan and Dill terminated Workman "in substantial part" due to his negative performance review in July of 1987 (Aplt. App. at Tab 10, p. 15, ¶ 53.h.6; p. 33, ¶ 88). As Workman explains in his complaint, the negative performance review of July 1987 "was adopted and served in part as the basis for the defendant's justification of plaintiff's termination in November of 1989." (Aplt. App. at Tab 10, p. 33, ¶ 88). Or, as he explains in his petition, "Respondents adopted the earlier *retaliatory act* and used *it* as a basis for terminating Workman's employment." (Pet. at 20, emphasis added). In neither his complaint nor his petition does he allege that his termination in November of 1989 was based in part upon his speech at the July 1987 grievance hearing.

Accepting the allegations of his complaint, Workman knew in July of 1987 that he had been retaliated against for speaking at his co-employee's grievance when he was subjected to a previously unscheduled performance review, placed on disciplinary suspension and given the first unsatisfactory performance review in his lengthy employment history (Aplt. App. at Tab 10, pp. 4-5, ¶¶ 17-20; p. 33, ¶¶ 86-87). Workman knew that he had been injured at that time, yet he did not file suit for over two years. The contents of his negative performance review therefore became final. As Workman admits, his subsequent termination in November of 1990 was based in part upon his then-final performance review from July of 1987, *not* upon his speech at the July 1987 grievance hearing (*Id.* at 15, ¶ 53.h.6; p. 33, ¶ 88). Thus, to the extent his termination in November of 1990 was based in part upon the July 1987 performance appraisal, the termination merely constituted a

further development of the previous injury of which Workman was already aware in July of 1987.

It is well established in Colorado (as elsewhere) that a cause of action accrues when the plaintiff is aware he has suffered some injury upon which a lawsuit could be brought, and that the plaintiff may not await the full development of his injuries before filing suit. *Doyle v. Linn*, 37 Colo. App. 214, 547 P.2d 257, 259 (1975); *Housing Authority v. Leo A. Daly Co.*, 35 Colo. App. 244, 533 P.2d 937 (1975); *Dalton v. Dow Chemical Co.*, 280 Minn. 147, 158 N.W. 2d 580, 585 (1968); *Olson v. Bell Telephone Laboratories, Inc.*, 388 Mass. 171, 445 N.E. 2d 609, 610 (1983). Similarly, the "crucial time for accrual purposes" under § 1983 "is when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action." *Singleton, supra,* 632 F.2d at 192. Workman was aware that he was suffering from an alleged wrong (unjustified disciplinary suspension and negative performance appraisal) for which damages may be recovered in a civil action under § 1983 when he received the allegedly unjustified disciplinary suspension and negative performance appraisal in July of 1987. Having not filed suit within two years of that known injury, his claim for an alleged violation of his right of free speech arising from that incident is time-barred, as the Tenth Circuit properly found. *Sandutch, supra*, 684 F.2d at 254 (" . . . he has alleged continuing ill-effects from preconviction acts"). Conversely, if Workman asserts that the disciplinary suspension and negative performance review alone did not constitute an injury upon which suit could have been brought, then he must also admit that the letter of reprimand and performance appraisal placed in his personnel file, and the development of the "re-entry plan" for him, following his own grievance in March of 1990, do not constitute sufficient injury to give rise to a First Amendment claim based upon the alleged incident in 1990.

Accordingly, this Court should also decline Workman's invitation to issue the writ of certiorari to the Tenth Circuit to review its holding with respect to the timeliness of Workman's first free speech claim.

CONCLUSION

Respondents respectfully request that this Court refuse to issue the writ of certiorari to the Tenth Circuit.

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